BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM H. MCCARY, JR. Claimant	)	
VS.	)	Docket No. 1,026,733
CESSNA AIRCRAFT Self-Insured Respondent	)	

ORDER

Respondent requested review of the March 29, 2011, Review and Modification Award by Administrative Law Judge Nelsonna Potts Barnes (ALJ). The Appeals Board (Board) heard oral argument on July 6, 2011. E. L. Lee Kinch, of Wichita, Kansas, was appointed as a Board Member Pro Tem in this matter.

APPEARANCES

James B. Zongker, of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board, the parties acknowledged the earlier stipulation that claimant's average weekly wage was $727.14 on the date of accident. Additionally, the parties stipulated that the wage increase to $957.03 occurred on March 18, 2010, the date claimant was terminated from his employment and his fringe benefit package ceased. The parties further stipulated that claimant's post-injury wage is $370.56, reflecting a wage loss of 49 percent before the addition of the fringe benefits and 61 percent after the fringe benefit amount was added to the average weekly wage.

ISSUES

The ALJ found claimant to have a 61 percent work disability based on a 61 percent wage loss and a 61 percent task loss.

Respondent requests review of the nature and extent of claimant's permanent partial disability. Respondent contends that the Board should modify the ALJ's Award and find claimant's work disability to be 24.5 percent based on a wage loss of 49 percent and task loss of zero percent.

Claimant argues that the Award should be affirmed.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact:

On November 7, 2008, claimant entered into a running award for injuries suffered to his left hip and back on December 6, 2005. He had surgery on his hip and then returned to work with restrictions of no stairs, no ladders, no kneeling and no bending. These restrictions were not placed on claimant by a health care provider. They were, instead, placed on claimant by respondent's First Aid staff. Claimant was able to work within these restrictions, performing a job for respondent comprised primarily of sit-down duties.

Claimant continued in this light-duty job until claimant was laid off on June 12, 2009, at which time his wages stopped. However, claimant continued to be an employee until March 18, 2010.[1] Claimant testified that he was not laid off in June because of an accident. A motorcycle accident claimant had on June 5, 2009, kept claimant off work for a period of time with a significant left arm injury. Once he was released from the injuries to his left arm, his layoff was finalized.[2] Claimant acknowledged that he was scheduled to be laid off before the motorcycle accident. However, apparently respondent retained claimant as an unpaid employee until March 2010, so that claimant could maintain his medical insurance. When claimant was released to return to work in March 2010, the layoff was finalized on March 18, 2010, and the medical insurance and other fringe benefits were discontinued.

After he was laid off, claimant looked for work and found a job with First Student as a bus driver on August 3, 2010. Claimant is working 30 hours a week, making $12.00 an hour. For any hours worked beyond 30 hours, claimant earns an extra $10.00 an hour.[3] The parties have stipulated to a post-injury wage of $370.56.

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[1] R.M.H. Trans. at 8.

[2] R.M.H. Trans. at 9.

[3] R.M.H. Trans. at 9-10.

Claimant's present complaints are in his hip, left knee and lower back, and he is not able to stand for more than 30 minutes. However, he is able to work within his most recent restrictions, which were assigned by Pedro A. Murati, M.D. Claimant's pain is 6 out of 10 on an average day and a 10 on the days he has to stand more than 30 to 45 minutes.[4] Claimant testified that he has been successful working as a bus driver because he is able to sit most of the time.

Since claimant's work-related injury, he has not been able to return to work at a comparable wage and there has been no change in his medical condition for the injuries related to this claim. Claimant continues to look for work.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an independent medical evaluation (IME) on April 14, 2010. His chief complaints at the time were occasional aching in the left hip, and occasional pain in the lower back and down into the left knee. Claimant attributes this occasional pain to his work injury sustained on December 6, 2005.[5] He also reported that he, on occasion, uses a cane to get around.

Upon examination, Dr. Murati opined that claimant had left patellofemoral syndrome; status post left hip replacement using noncemented Stryker components and a ceramic interface; and low back pain secondary to antalgia.[6] He went on to assign the following temporary work restrictions: no climbing stairs or ladders; no squatting, crawling or driving (manual); no kneeling; no repetitive foot controls with the left; no lifting, carrying, pushing or pulling more than 20 pounds, occasionally 20 pounds and 10 pounds frequently; no lifting below knuckle height; and rarely stand, walk, bend, crouch or stoop. Dr. Murati indicated that claimant needed a sit-down job.[7] Again, Dr. Murati attributed his diagnosis and restrictions to claimant's December 6, 2005, work accident.

Claimant and Dr. Murati had previously met on August 16, 2007, in relation to claimant's December 2005 injury and at which time claimant was diagnosed with left patellofemoral syndrome; left SI joint dysfunction; low back pain secondary to antalgia; status post percutaneous pinning (left hip); status post left total hip replacement after previous hip surgery using uncemented Stryker components and a ceramic interface and removal of left femoral neck and head screws.[8] Dr. Murati went on to assign the restriction

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[4] R.M.H. Trans. at 11.

[5] Murati Depo., Ex. 1 at 1 (Dr. Murati's Apr. 14, 2010 IME report).

[6] Murati Depo., Ex. 1 at 3 (Dr. Murati's Apr. 14, 2010 IME report).

[7] Murati Depo., Ex. 1 at 4 (Release to Return to Work Apr. 14, 2010).

[8] Murati Depo. at 5.

of allowing claimant to work as tolerated and to use common sense. Dr. Murati attributed his diagnosis and restrictions to claimant's work accident on December 6, 2005.

Claimant's original job duties for respondent entailed "loading, unloading trucks, ricks, parts in the system," delivering parts where they needed to go, lifting, pushing and pulling pallets and boxes, and driving a forklift.[9] However, when claimant returned to work after the work-related accident, he was given a job which entailed mostly sit-down work.

Dr. Murati reviewed the task list of vocational expert Jerry Hardin and opined that, out of 158 tasks, claimant had lost the ability to perform 96 tasks, for a task loss of 61 percent.[10]

In his report, Mr. Hardin opined that if the duplicated tasks were deleted, claimant would have a 68 percent task loss. (The Board determined that the task list is comprised of 40 non-duplicative tasks. The restrictions and task loss opinion of Dr. Murati[11] would eliminate 27, for an actual task loss of 67.5 percent.) Mr. Hardin identified the duplicated tasks as those with an asterisk (*) beside them.[12] Mr. Hardin then applied the 100 percent wage loss with the 68 percent task loss to determine that claimant had an 84 percent work disability in his opinion. He went on opine that, at the time they met, claimant had a 100 percent wage loss. By the time Mr. Hardin was deposed, claimant was working again. Mr. Hardin opined that, based upon wage information he was provided (pre-injury wage of $957.03 and $360 post-injury wage), claimant had a 62 percent wage loss.[13] Then, after applying the new wage loss with claimant's task loss, he opined that claimant had a 65 percent work disability. If Mr. Hardin were to use $727.14 as an actual pre-injury wage and $370.56 as an actual post-injury wage, claimant would have 49 percent wage loss.[14]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[15]

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[9] Murati Depo., Ex. 1 at 2 (Dr. Murati's Apr. 14, 2010 IME report).

[10] Murati Depo. at 12.

[11] Murati Depo., Ex. 2.

[12] Hardin Depo., Ex. 1 at 6 (Hardin's June 1, 2010 report).

[13] Hardin Depo. at 8-9.

[14] Hardin Depo. at 10-11.

[15] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[16]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[17]

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[18]

The parties have stipulated to a whole person functional impairment of 18 percent as was determined at the time of the original settlement and running award. However, there remains a significant dispute regarding claimant's entitlement to a permanent partial general (work) disability under K.S.A. 44-510e, after June 12, 2009.

Claimant worked for respondent earning a comparable wage until June 12, 2009. Thereafter, he was laid off, earning no wages through August 3, 2010. However, claimant's fringe benefit package continued through March 18, 2010.

It was stipulated that claimant lost his fringe benefit package with respondent, on March 18, 2010. He was able to find a job with First Student, effective August 3, 2010, earning a stipulated post-award weekly wage of $370.56.

With regard to the wage loss suffered by claimant, respondent contends that the Board should compare claimant's pre- and post-award wages without the inclusion of any fringe benefits. Claimant was offered post-award fringe benefits from his current employer,

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[16] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[17] K.S.A. 2005 Supp. 44-501(a).

[18] K.S.A. 44-510e.

but declined as he could not afford the premiums. Plus, his wife had insurance through her work at a significantly reduced cost.

> The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.[19]

Statutorily, the term "wage" includes any additional compensation, i.e. fringe benefits, provided by an employer to its employees.

> The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.[20]

When this additional compensation is discontinued, as was the case here, the value of that additional compensation is then added to the average weekly wage. Thus, on March 18, 2010, when claimant's fringe benefit package was discontinued, the value for same must be added to claimant's average weekly wage. Per the parties' stipulations, claimant's average weekly wage up to March 18, 2010, is $727.14. Effective March 18, 2010, the fringe benefit package was discontinued, and the stipulated value of $229.89 must be added to the wage for a new average weekly wage of $957.03. The wage loss

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[19] K.S.A. 2005 Supp. 44-511(a)(3).

[20] K.S.A. 2005 Supp. 44-511(a)(2).

portion of the work disability calculation would be 100 percent through August 2, 2010. The wage used to calculate a wage loss would be $727.14 for the period from June 13, 2009, up to March 18, 2010. Thereafter, claimant's wage would include the fringe benefits, resulting in a wage of $957.03. Once claimant began his job with First Student, on August 3, 2010, the wage loss would be 61 percent.

Respondent disputes that claimant has proven a task loss percentage in this matter. Respondent argues that Dr. Murati, the only physician to provide a task loss opinion, lacks credibility. After the initial injury in December 2005, Dr. Murati advised claimant to "work as tolerated and use common sense."[21] However, after claimant was laid off from respondent, Dr. Murati assigned claimant with significantly more stringent restrictions, even after diagnosing claimant with fewer physical problems. From an objective standpoint, claimant appears to have improved. Yet the restrictions increased substantially. However, one fact that respondent appears to overlook is the fact that claimant, even while being returned to work with very limited restrictions, was placed on light duty by respondent's own First Aid staff. Claimant's job, through his last day worked, was primarily limited to a sit-down job. This indicates that respondent did not fully accept the very light restrictions of Dr. Murati from the 2005 accident. It also raised doubt regarding claimant's ability to return to the open labor market after his layoff.

It was argued before the Board that the light restrictions of Dr. Murati were intended to facilitate claimant's ability to return to work for respondent. More strict restrictions would have potentially inhibited that return. However, Dr. Murati was not asked those questions. Therefore, that argument is merely speculation rather than fact. What is clear is that claimant was significantly limited by respondent on his return to work and remained so for the duration of his employment with respondent. Respondent disputes Dr. Murati's credibility, but provides no opposing medical opinion regarding claimant's restrictions and limitations. While Dr. Murati's opinions, along with his testimony, are not the most persuasive ever seen by the Board, his opinions are not so incredible or untrustworthy as to be disregarded entirely. Moreover, Dr. Murati's task loss opinion is the only opinion in this record. Respondent's cross-examination of the doctor and its arguments to the Board are not so compelling as to persuade the Board to totally disregard Dr. Murati's testimony.

CONCLUSIONS

The Board finds that claimant has suffered a task loss from the 2005 work-related accident and that loss is properly identified by Dr. Murati, using the task list of Mr. Hardin, as 68 percent. (This figure utilizes the duplicate task determination of Mr. Hardin.)

Claimant suffered a wage loss of 100 percent from June 13, 2009, through August 2, 2010. When combined with the task loss of 68 percent, this calculates to a

[21] Murati Depo. at 17.

work disability of 84 percent. Effective on August 3, 2010, claimant's wage loss reduces to 61 percent, based on an average weekly wage of $957.03. When combined with the task loss of 68 percent, claimant's work disability is reduced to 64.5 percent. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Review and Modification Award of Administrative Law Judge Nelsonna Potts Barnes dated March 29, 2011, is modified to award claimant a permanent partial general disability award of 84 percent through August 2, 2010, and a 64.5 percent permanent partial disability thereafter. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, William H. McCary, Jr., and against the self-insured respondent, Cessna Aircraft, for an accidental injury which occurred December 6, 2005, and based upon an average weekly wage of $727.14 through March 18, 2010, and an average weekly wage of $957.03 thereafter.

Claimant is entitled to 14.57 weeks of temporary total disability compensation at the rate of $467.00 per week totaling $6,804.19, followed by 74.70 weeks of permanent partial disability compensation at the rate of $467.00 per week totaling $34,884.90 for an 18 percent permanent partial whole body disability on a functional basis, followed by 59.43 weeks of permanent partial disability compensation at the rate of $467.00 per week totaling $27,753.81 for an 84 percent work disability, followed by permanent partial disability compensation at the rate of $467.00 per week not to exceed $100,000.00 for a 64.5 percent work disability.

As of July 13, 2011, there would be due and owing to the claimant 14.57 weeks of temporary total disability compensation at the rate of $467.00 per week in the sum of $6,804.19, plus 183.41 weeks of permanent partial disability compensation at the rate of $467.00 per week in the sum of $85,652.47, for a total due and owing of $92,456.66, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $7,543.34 shall be paid at the rate of $467.00 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge